IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

WRIT PETITION NO.1301 OF 2000

1. L.D.Textile Industries Ltd.,
   a Company incorporated under
   the provisions of the Companies
   Act, 1956, having its registered
   office at 127, Rohal Kutir,
   JVPD Scheme, Gulmohar Cross
   Road No.10, Vile Parle (West),
   Mumbai 400 056.

2. Mr.Sachin Mehra,
   of Mumbai Indian Inhabitant
   residing at Mehra House,
   10/2, Azad Nagar Society,
   N.S.Road No.1., J.V.P.D.,
   Scheme, Mumbai 400 056,
   a shareholder of petitioner
   No.1 abovenamed. Petitioners

vs.

1. Union of India,

2. The Commissioner of Customs,
   (Imports), having his office
   at New Custom House,
   Ballard Estate, Mumbai-400 038.

3. The Customs Excise and Gold
   (Control) Appellate Tribunal
   (WRB), having its office at
   3rd floor, PNB House, Sir P.M.
   Road, Fort, Mumbai 400 001. Respondents

Mr.Prakash Shah with Mr.Gajendra Jain i/b.M/s.Anderson
Legal India for the petitioners.

Mr.S.M.Shah with Mr.K.R.Chaudhari
i/b.Mr.R.N.Bandopadhyay for the respondents 1 and 2.

CORAM : R. M. LODHA &
J. P. DEVADHAR,JJ.

DATED : 4th May, 2006

ORAL JUDGMENT (Per R.M.Lodha,J.)

The petitioners, by means of this writ petition, seek to impugn the order dated 10th May, 2000 passed by the Customs, Excise & Gold (Control) Appellate Tribunal, West Zonal Bench, Mumbai (for short, 'the Tribunal'). By the said order, the Tribunal directed the first petitioner to deposit Rs.15 lacs as a condition to hearing of the appeal preferred by it under section 129(d) of the Customs Act, 1962. The Tribunal also directed the three directors viz. M/s.V.K.Mehra, T.R.Mehra and J.N.Mehra to deposit Rs.1,00,000/- each as a precondition to hearing of their appeals under Section 129(d) of the Customs Act, 1962.

2. The controversy arises in the circumstances that may be briefly noticed by us. On 14th November, 1986 the Additional Chief Controller of Imports and Exports passed a debarment order against the first petitioner for having contravened the provisions of Section 4-I (1)(a) of the Imports & Exports (Control) Act and clause 8(1)(b)(d)(f) of the Imports (Control) Order, 1955. The debarment order came to be passed after the notice was given to the first petitioner. By the said debarment order, the first petitioner and its directors were

debarred from making imports and receiving import licences/CCPs and receiving any imported material from STC/MMTC or any other canalising agency and also from importing any material, machinery, etc. under OGL for 15 licensing periods from AM 1986 to AM 2000.

3. The intelligence was gathered that the first petitioner was importing goods in violation of debarment order dated 14th November, 1986. The premises of the first petitioner were searched and certain incriminating documents were found and based on the search and investigation, a show cause notice was issued to the first petitioner and its directors M/s.V.K.Mehra, T.R.Mehra and J.N.Mehra. Upon conclusion of the proceedings pursuant to the show cause notice, the Assistant Commissioner of Customs passed the order in original dated 31st May, 1999 confirming the demand of duty of Rs.8,10,152/- and imposed the penalty as indicated above.

4. Aggrieved by the order dated 31st May, 1999, four appeals came to be filed. One by the first petitioner and the other three by the three directors. Four separate applications for dispensing with the pre-deposit and stay were made by each of the appellants in four appeals. The Tribunal found prima facie case in respect of the confirmation of demand of duty on the

ground of limitation and, accordingly, dispensed with for the predeposit of duty. However, as regards the penalty, the Tribunal found that there was no prima facie case made out by any of the appellants-applicants and there being also no case made out of financial hardship, the Tribunal directed the first petitioner to deposit the entire penalty of Rs. 15 lacs as a condition to hearing their appeal and the three directors were directed to deposit Rs.1,00,000/- each.

The three directors have not challenged the order.

5. The challenge in the writ petition is confined to the direction to the first petitioner-company to deposit the entire penalty of Rs.15 lacs as a condition to hearing of their appeal.

6. Mr.P.S.Shah, counsel for the petitioners submitted that the penalty was imposed in the order in original on two grounds: (one)that the first petitioner deliberately undervalued the goods and (two) the goods were imported in contravention of debarment order dated 14th November, 1986. He would submit that in so far as the penalty based on the undervaluation of goods is concerned, the prima facie case in favour of the petitioners with regard to the confirmation of duty having already been found, the Tribunal ought to have found prima facie case in petitioners' favour on the

ground of undervaluation. He would submit that as regards the imposition of penalty on the ground of contravention of debarment order is concerned, the said finding in the order in original is erroneous as the Imports and Exports (Control) Act, 1947 came to be repealed by Foreign Trade (Development and Regulation) Act, 1992 and, therefore, the debarment order did not survive. According to the counsel for the petitioners the import of goods was not 'prohibited goods' as defined in Section 2(33) of the Customs Act, 1962. He, thus, submitted that the petitioners made out a prima facie case before the Tribunal. The counsel would also submit that the first petitioner was a Sick Industrial Undertaking and, therefore, the Tribunal's finding that the first petitioner has not been able to prove financial hardship is erroneous. Lastly, the counsel submitted that direction to the first petitioner to deposit the entire amount of penalty is too harsh and deserves to be interfered with by this Court in extraordinary jurisdiction. The counsel relied upon the following judgments: (i)P & B Pharmaceuticals (P) Ltd. v. Collector of Central Excise, **2003(153) E.L.T. 14 (S.C.)** and (ii) ECE Industries Limited v. Commissioner of Central Excise, New Delhi, **2004(164) E.L.T.236 (S.C.)**.

7. Mr.Suraj M. Shah, counsel for the revenue submitted

that the only contention raised in the writ petition in challenging the impugned order is based on under Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short, 'SICA') and that the first petitioner company being Sick Industrial Unit is not in a position to deposit the penalty amount. The counsel for revenue submitted that save and except the aforesaid ground, no other ground has been set up in the writ petition and this ground has no merit. He, thus, submitted that the impugned order does not call for any interference.

8. Confronted with this, the counsel for the petitioner admitted that the only point set up in the writ petition is with regard to Section 22 of SICA and, first petitioner's inability to deposit the amount being Sick Industrial Unit but he submitted that the contentions raised by him are matter of law and even if those contentions have not been set up in the writ petition, the same can always be considered at the time of hearing. In this regard, he referred to two judgments: (i) CIT v. Scindia Steam Navigation Co.Ltd., **A.I.R. 1961 SC 1633** and (ii) Additional Commissioner of Income-tax v. M/s.East Coast Floor Mills Pvt.Ltd., **A.I.R.1994 S.C.1513**.

9. That in challenging the order dated 10th May, 2000

passed by the Tribunal, the petitioners in writ petition have set up only one ground with regard to Section 22 of SICA is not in dispute. The contention with regard to SICA has no force in the light of the judgement of the Supreme Court in the case of Metal Box India Ltd. v. Commissioner of Central Excise, **2003(155) E.L.T.13** wherein the Supreme Court observed thus:

> "3. Mr.Rana Mukherjee, the learned counsel for the appellants, submits that in view of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short 'the Sick Industries Act'), the appellant need not deposit the amount, as ordered by the Tribunal, as protection is available to the appellant under the said provision. We are afraid, we cannot accept the contention of the learned Counsel for reasons more than one. First, this aspect was not the subject matter of the order under challenge and, secondly, Section 22 of the Sick Industries Act, provides relief in regard to the proceedings which relate to (a) winding up of the industrial company; (b) execution, distress or the like against any of the properties of the industrial company, (c) the appointment of a receiver in respect thereof, and (d) proceeding in regard to suit for recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company. Payment of pre-deposit covered under Section 35F of the Central Excise Tax Act, 1944 does not fall under any of the above-mentioned categories in Section 22 of the Sick Industries Act."

10. The other contentions raised before us have not been raised in the writ petition and, therefore, cannot be permitted to be raised.

11. Even otherwise, the finding of the Tribunal on the aspect of penalty that no prima facie case has been made out does not suffer from any legal infirmity. The repeal of Imports and Exports (Control) Act, 1947 does not bring to an end the debarment order dated 14th November, 1986. Sub-section (2) of Section 20 of the Foreign Trade (Development and Regulation) Act, 1992 clarifies in an unmistakable terms that repeal of Imports and Exports (Control) Act, 1947 shall not affect anything suffered thereunder or any penalty, confiscation or punishment incurred in respect of any contravention under the Act so repealed. The first petitioner has been found to have imported the goods in contravention of debarment order and prima facie, therefore, it cannot be said that the finding of the Tribunal that the petitioners have not been able to make out a case concerning the penalty cannot be faulted.

12. We have reservation about the correctness of the observations made by the Tribunal in paragraph 8 of the impugned order but we do not deal with this aspect further save and except that the said aspect shall be finally considered by the Tribunal at the time of hearing of appeals.

13. As regards the financial hardship, the Tribunal in paragraph 7 has categorically recorded that the balance

sheet of the year 1998-99 showed bank balance of Rs.93,31,000/-. The Tribunal found that it cannot be said that any financial hardship would be caused to the first petitioner if the pre-deposit order is made. We have no justifiable reason to take a different view.

14. The Tribunal having found that no prima facie case has been made out by the first petitioner for waiver of pre-deposit and that no financial hardship would be caused, the direction to the first petitioner to deposit the entire penalty of Rs.15 lacs as a condition to hearing of their appeal cannot be said to be too harsh as contended by the counsel for the petitioners.

15. None of the judgments cited by the counsel has any relevance and, therefore, we do not deem it necessary to deal with the said decisions.

16. Writ petition has no merit and is dismissed with no order as to costs.

17. At this stage, the counsel for the petitioners submits that the first petitioner may be granted some time to deposit the amount of Rs.15 lacs as directed by the Tribunal in the order dated 10th May, 2000. He submits that the appeal preferred by the first petitioner has not been dismissed by the Tribunal so far

for want of pre-deposit. The counsel for the revenue has left the matter to the Court. If, within four weeks from today, the amount of Rs.15 lacs is deposited by the first petitioner, the Appeal No.C/952/99 shall be heard by the Tribunal on merits failing which the said appeal shall stand dismissed automatically.

(R.M. LODHA,J.)

(J.P. DEVADHAR,J.)